No. 87-1595

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1987

EDWARD J. HALLORAN,

Appellant,

-against-

STATE OF NEW YORK,

Appellee.

Appeal from the Supreme Court of the State of New York,
Appellate Division, First Department

MOTION TO DISMISS OR AFFIRM

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No. 87-1595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

EDWARD J. HALLORAN,

Appellant,

v.

STATE OF NEW YORK,

Appellee.

On Appeal from the Supreme Court of the State of New York, Appellate Division, First Department

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of New York, Appellate Division, First Department. The questions upon which the decision of this matter depends are so insubstantial that

they do not need further argument before this Court.

STATE STATUTE INVOLVED

This appeal raises the validity of New York State's legislative scheme which permits the sentencing court to impose upon a defendant convicted of a misdemeanor a fine of up to twice the amount "gained" through the commission of the crime.

New York Penal Law section 80.05 provides that the trial judge, after a defendant has been convicted of a misdemeanor, may impose as a fine on a defendant who "has gained money or property through the commission of any misdemeanor ... an amount, fixed by the court, not exceeding double the amount of the defendant's gain from the commission of the offense." New York Penal Law

section 80.00 (2) defines "gain" as "the amount of money or the value of property derived from the commission of the crime, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed."

Under New York Penal Law section 80.00 (3), the sentencing court makes the factual determination of the amount of the gain. If the record contains insufficient information as to gain, the court may, pursuant to New York Criminal Procedure Law section 400.30, conduct a hearing. At that hearing, the People have the burden to prove by a preponderance of the evidence the amount of the defendant's gain.

STATEMENT OF FACTS

From the spring of 1983 to March 1984, appellant organized and operated a $9,200,000,000 check-kite, the most monumental check fraud in the history of American banking. By the synchronized drawing and depositing of some 15,000 checks, appellant, and a team of people employed by him, created the false appearance that appellant had his own money in checking accounts at Citibank, N.A. and Marine Midland, N.A.[1] Relying

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[1]In essence, a check-kite scheme works as follows: First, the defendant sets up one checking account in Bank A and one checking account in Bank B. Next, a check for X dollars is drawn on the Bank A account and deposited into the Bank B account, and, at about the same time, a check for X dollars is drawn on the Bank B account and deposited into the Bank A account. As a result, Banks A and B credit the respective accounts even though the defendant has insufficient funds in both accounts. These actions are repeated again and again to prevent the banks from recognizing that a kite is

(continued...)

upon this false appearance of money belonging to the appellant, Citibank and Marine Midland permitted appellant to withdraw $23 million of what was, in truth, the banks' money.

Appellant "invested" the bulk of the defrauded funds into his financial empire which, due to lack of funding, verged on collapse.[2] By this

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[1](...continued)
underway. Next, the defendant uses the credits to the respective accounts to write checks to third-parties. Banks A and B will honor those checks in the belief that the defendant has funds in the accounts.

[2]Aside from this "investment," appellant put $2,000,000 of the kite money into his personal checking account, and appellant's codefendant used kite funds to build a vacation home with thirteen bedrooms and a kitchen that seats forty-five (Halloran: T 2082-2083, 2134-2141, A.D.R.App 69-70, 120-127; Madden: T 2318-2322, A.D.R.App 195-199).

Numerals preceded by "App" refer to the Appellant's appendix in this Court. "A.D. App." refer to Appellant's
(continued...)

"investment" of the criminal proceeds, appellant's businesses were not only saved from bankruptcy but actually grew in value, from a value of $100,000,000 at the beginning of the crime to a value of $200,000,000 at the crime's end. When the $9,200,000,000 check-kite was discovered, appellant offered to restore to the banks the $23,000,000 taken with interest calculated from the day the crime was discovered. Six months later, appellant did restore this amount, a small fraction of the profit he had realized by his crime.

On June 20, 1985, a Grand Jury indicted appellant on one count of Scheme to Defraud in the Second Degree

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[2](...continued)
appendix in the Appellate Division, and numerals preceded by "A.D. R.App" refer to appellee's appendix in that court. Numerals preceded by "T" refer to the trial transcript.

(New York Penal Law § 190.60) and two counts of Grand Larceny in the Second Degree (New York Penal Law § 155.35). New York County Indictment Number 3955/85.[3] (A.D. App. 5-7).

Appellant proceeded to trial. On cross-examination, he was compelled to concede every element of the Scheme to Defraud charge. He testified that the scheme was created because Citibank and Marine Midland would not honor appellant's checks unless appellant had positive account balances in his accounts. He admitted that he had taken other people's money by deceit. To him, however, such fraudulent takings were

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[3]Also charged with appellant was Harold F. Madden. He was convicted of Second Degree Scheme to Defraud and sentenced to 120 days of community service, a fine of $100,000, and a mandatory surcharge of $60.

just interest-free loans. Since he was a "rich man," he believed that he was "entitled" to such loans. To take other people's money by deceit was a "privilege" which came with his wealth (E.g., Halloran: T1872, 2028-2031, 2048, 2050, 2065, 2123-2124, 2169, A.D.R.App 15-18, 35, 109-110, 155).

Appellant's wealth was the exclusive focus of the defense case. Appellant claimed that he always intended to restore the money taken from the banks and, therefore, did not intend to "permanently" deprive the banks. "Permanent deprivation" is an element of the New York State larceny statute. See New York Penal Law § 155.00 (3). Through financial documents, an accountant and his own testimony, appellant sought to prove that, due to the $200,000,000 of value of his businesses, he always

intended to repay the money taken, as he did (six months after discovery of the crime). Appellant conceded that he committed the $9,200,000,000 crime to preserve and increase his wealth, and that the crime resulted in a $100,000,000 increase in the value of his assets (Halloran opening: T79-80, Acox T1795-1797, 1799-1800, 1807-1808, 1810-1814, 1821, 1835; Halloran: T 1860, 1872, 1881-1882, 1884-1885, 1908-1911, 1914, 1920-1921, 2028-2031, 2036-2037, 2048, 2137-2138, 2148, A.D.R.App 15-18, 35, 123-124, 134; Halloran summation: T2422-2425, Def. Trial Exh. M-A and H-W, A.D.R.App. 257, A.D.App. 671).

The jury convicted appellant of the scheme to defraud and acquitted him on the larceny counts.[4]

After the conviction, the court ordered a hearing to determine appellant's gain, if any, from the crime. In a memorandum submitted prior to the hearing, the People argued that appellant's "gain" was two-fold: costs saved (such as interest not paid on the fraudulently obtained funds); and appreciation on assets preserved or renovated with the kite funds. The

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[4]At the time of his crime, the scheme to defraud committed by appellant was a misdemeanor. Because of this case, the New York State Legislature made the crime a felony. See McKinney's 1986 Session Laws of New York, Memorandum of State Executive Department, p. 2960, 2961 (West Publishing 1987). The Halloran amendment became effective November 1, 1986, the day after appellant's sentencing. Session Laws of New York, ch. 515, p. 1120 (West Publishing 1987).

hearing occurred on October 7 and 31, 1986.

Appellant opposed conducting a hearing. In addition to raising claims of statutory construction, appellant contended that New York's legislative scheme for determining a fine violated the Due Process Clause because (1) "gain," as set forth in the scheme, does not provide "fair notice" that it includes "appreciation" (A.D. App. 99-100), (2) the amount of the fine was decided by a judge, not a jury (A.D. App. 101), and (3) any fine imposed above $1,000 (the maximum statutory fine in the absence of a finding of gain) would be an "excessive fine" and "cruel and unusual punishment" (A.D. App. 109).

The judge rejected appellant's legal arguments and conducted the hearing, at the conclusion of which she

made factual findings. As found by the court, the properties controlled by appellant had been in a "desperate cash-flow position" prior to the check fraud (App. 6a). The $23,000,000 taken from the banks by the kite became "the life-blood of [appellant's] businesses" (App. 7a). The crime money paid the bills, keeping appellant's companies viable so that appellant could retain possession of them. But for the fraudulently obtained funds, the court concluded, appellant's "losses would have been staggering" (App. 7a). According to the defense trial evidence, which was introduced by the People at the hearing, the bulk of the banks' $23,000,000 was used to preserve and increase appellant's financial empire so that, when the fraud was uncovered, his assets had increased in value from $100,000,000 to $200,000,000 (Defense

Trial Exhibit M-A, A.D. R.App. 257; Defense Trial Exhibit H-W, A.D. App. 671).[5]

The court found that, after deducting the $23,000,000 taken from the banks but repaid to them, appellant still retained a financial profit. First, he had avoided a cost; interest. Had he obtained $23,000,000 by lawful loans, he would have paid interest for the use of the money. By taking

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[5]On the defense case, appellant called the accountant who had testified for the defense at trial. In his hearing testimony, the accountant tried to repudiate the defense trial evidence that Halloran was fabulously wealthy. This trial evidence, of course, had been elicited by the defense in order to convince the jury that Halloran was always wealthy enough to repay the kite funds and, therefore, should be acquitted on the larceny courts. At one point, the accountant's already unbelievable testimony became so confused and contradictory that the court noted that it would take the witness's "numbers" on Halloran's wealth for "what they are worth" (A.D. App. 498-504).

$23,000,000 by fraud for a year, he avoided $2,320,000 in interest costs.

Appellant's second financial gain was the appreciation of several of his properties. That this appreciation was the direct result of his use of the swindled funds was, as the court found, established "without evidentiary contradiction" (App. 8a). For example, appellant's trial evidence had shown that appellant used $6 million of the criminally-obtained funds to retain possession of and to renovate one of his properties, the Taft Hotel. But for the crime, he could never have purchased, retained, or renovated the hotel. At the crime's conclusion, he was able to sell the renovated hotel at an enormous profit. The capital gain reported on his income taxes was $14,186,718 (Acox: T1798, 1807-1808, 1810-1814, Halloran:

T1908-1911; Defense Trial Exh. H-W, A.D.R.App. 671; see App. 15a). To prevent four of his southern hotels from going into bankruptcy, he invested $8,000,000 of the kite funds into these properties. Thus, he retained possession of these $21,000,000 of assets, and one, a Holiday Inn, appreciated by $1,400,000 (App. 16a). By putting over $7,000,000 of kite funds into his concrete companies, these $33,000,000 of businesses remained in his possession and appreciated by some $6,100,000 (App. 16a).

In short, the court determined that, by means of the $9,200,000,000 scheme to defraud, appellant had created and retained an enormous financial benefit. The court calculated the gain to be "in excess of $22,000,000.00" (App. 22a; see also App. 8a).

Rather than fining appellant twice the gain, as permitted by statute, the court fined appellant only $25,000,000. A mandatory surcharge of $60 was imposed. In addition, appellant was sentenced to a six-month term of imprisonment (App. 21a-22a).

On appeal to the Appellate Division, First Department, appellant argued, inter alia, that the $25,000,000 fine violated the Due Process Clause because (a) the word "gain" did not provide fair notice of appellant's potential liability; (b) the amount of the gain had not been determined by proof beyond a reasonable doubt; (c) the amount of the gain had not been set by a jury; and (d) the resulting fine was an excessive fine that amounted to cruel and unusual punishment because it exceeded $1,000. Appellant did not contest that he ran the $9,200,000,000

scheme to defraud; that he took $23,000,000; that he used the bulk of the funds to retain and renovate assets which otherwise would have been lost; that he had no legitimate source of income to retain and renovate these assets; and that, during the crime, the value of his assets increased from $100,000,000 to $200,000,000.

On December 3, 1987, the Appellate Division affirmed appellant's conviction and sentence without opinion. ___ A.D.2d ___, 521 N.Y.S.2d 962. On December 15, 1987, the New York Court of Appeals denied leave to appeal to that court, 70 N.Y.2d 932, 524 N.Y.S.2d 684, and on January 25, 1988, an application for reconsideration of the leave denial was denied, 70 N.Y.2d 955, 525 N.Y.S.2d 859.

On January 29, 1988, Justice Thurgood Marshall denied appellant's application for a stay of sentence.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided by this Court.

1. The Preponderance Claim was not Presented Below in a Manner Appropriate for this Court to Now to Consider it. Indeed, the Sentencing Court Appears to have Made Its Finding On a Standard Greater than a Preponderance Standard. In any event, a Preponderance Standard Is Entirely Consistent With Due Process.

Appellant does not dispute that his guilt of a nine billion dollar fraud was established beyond a reasonable doubt. His claim is that, when determining what financial consequences appellant must suffer in the form of a statutorily-authorized fine for his unquestioned criminal conduct, a sentencing court must

make its factual determinations upon a standard higher than the statutorily-authorized preponderance of the evidence standard.

This case does not properly present this issue. For this Court to exercise its jurisdiction over such a claim - that a state enactment violates the Constitution - the appellant must have presented the issue to the state court in conformance with all reasonable state procedures. Mutual Life Insurance Company v. McGrew, 188 U.S. 291, 308-309, 23 S.Ct. 375, 378-379, 47 L.Ed. 480, 484-485 (1903). When, as here, the highest court to which the claim was presented does not pass expressly on the claim, precedent and the rules of this Court require that the party invoking Supreme Court jurisdiction show that the claim was properly raised. Sup.Ct. Rule 15.1

(g); Exxon Corp. v. Eagerton, 462 U.S. 176, 181 n.3, 103 S.Ct. 2296 n. 3, 76 L.Ed.2d 497, 504 n. 3 (1983); see also Sup.Ct. Rule 21.1 (h)(certiorari). Indeed, as the Court recently reaffirmed, the presumption is that a state court which has not expressly passed on a claim has concluded that the claim was not properly presented. Board of Directors of Rotary International v. Rotary Club of Duarte, ___ U.S. ___, ___, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474, 487 (1987).

Here, as appellant implicitly concedes (see Jurisdictional Statement, p. 8, n. 3), the sentencing court was not presented with the claim that the preponderance of the evidence standard was deficient under the Constitution. True, there was a claim that the matter should be tried by a jury. However, appellant never suggested that the

standard of proof had to be beyond a reasonable doubt or that the legislative scheme was defective for using a preponderance standard (A.D. App. 82-83, 95-96, 107-108).

The argument on the preponderance standard was made for the first time in appellant's brief on appeal to the Appellate Division. Under the procedural rules of New York, however, claims of error must be preserved by an objection in the lower court. New York CPL § 470.05 (2). Thus, the failure to object leaves unpreserved a claim that a particular sentencing procedure violated the Constitution in some way. People v. Oliver, 63 N.Y.2d 973, 483 N.Y.S.2d 992, 473 N.Y.2d 242 (1984); see also People v. Ingram, 67 N.Y.2d 897, 501 N.Y.S.2d 804,

492 N.E.2d 1220 (1986).[6] Because the preponderance claim was not presented to the sentencing court, it must be presumed that the appellate court did not reach the merits of that aspect of appellant's claim that the legislative scheme is unconstitutional. Thus, that claim cannot provide a basis upon which appellant can seek a review before this Court.

Appellant's claim is not an appropriate one for this Court to consider for a second reason. It is apparent that the trial judge did not rest her factual determinations on a

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[6]By way of contrast, New York does recognize that if the record shows a plain failure to be sentenced in accordance with an applicable statutory directive, such a claim is reviewable absent an objection. People v. David, 65 N.Y.2d 809, 493 N.Y.S.2d 118, 482 N.E.2d 914 (1985); People v. Fuller, 57 N.Y.2d 152, 455 N.Y.S.2d 253, 441 N.E.2d 563 (1982).

preponderance standard. The amount of the gain due to the appreciation of properties into which the swindled funds were pumped was established, the court observed, "without evidentiary contradiction" (App. 8a).[7] The court's critical findings were based upon a standard beyond the preponderance of the evidence standard. Thus, this case simply does not present an appropriate record to evaluate the constitutionality of either the standard of proof as set up

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[7]For this reason, it is difficult to understand appellant's assertion that the judge would have reached different conclusions if the standard was even "'clear and convincing evidence much less 'proof beyond a reasonable doubt'" (Jurisdictional Statement, p. 19). Further, in attributing to the court a quote regarding the prosecution's burden on gain, a quote which seems to minimize that burden (Jurisdictional Statement, p. 10), appellant takes the quote out of context. The court was distinguishing a related case and not, as appellant implies, stating the standard it was applying in this case.

in New York's legislative scheme or of that standard of proof irrespective of the legislative scheme.

In large part, appellant's Jurisdictional Statement is nothing but an argument with the sentencing judge's factual conclusions. Repeatedly, appellant refers to evidence that the sentencing judge had the right to reject and, in light of the disingenuous defense testimony and argument made at the hearing, every reason to reject (Jurisdictional Statement, pp. 17-19). Typical of appellant's bogus factual claims is the repeated assertion that the fine was based on assets "untainted" by, and "not even arguably" related to, the $9,200,000,000 fraud (Jurisdictional Statement, pp. 4, 11, 20, 21).

The interrelationship of appellant's assets and the swindled money was a factual issue at the hearing. After a full and complete opportunity to be heard, the issue was resolved against appellant. Frankly, in light of appellant's own trial evidence, it would not have been possible to conclude other than what the court did conclude - that, as appellant and his accountant had established at trial, the kite money was the "life-blood" of Halloran's businesses" (App. 7a). The sentencing judge's fact findings, affirmed by every New York State judge who has evaluated the evidence, should not be reviewed by this Court. Waters-Pierce Oil Company v. Texas, 212 U.S. 86, 97, 29 S.Ct. 220, 221, 53 L.Ed. 417, 424-425 (1909).

In any event, a preponderance standard as a basis for the deprivation of property unquestionably satisfies the Due Process Clause. This Court has recognized that Due Process does not generally even require that a person, convicted of the elements of a crime beyond a reasonable doubt, have the right to a hearing or to participate in a hearing at which the sentence is determined. Williams v. People of New York, 337 U.S. 241, 249-252, 69 S.Ct. 1079, 1084-1085, 93 L.Ed. 1337, _____ (1949); see Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). Nor does Due Process require any prescribed burden of proof for the fact determinations reached by sentencing judges. See McMillan v. Pennsylvania, 477 U.S. 79, 91, 106 S.Ct. 2411, 2420, 91 L.Ed.2d 67, 80 (1986). Appellant's

argument "confuses culpability with consequences." United States v. Sandini, 816 F.2d 869, 875 (3rd Cir. 1987).[8]

Indeed, in McMillan, this Court recently recognized that a fact determination underlying a sentencing decision that affected the length of a convicted defendant's custody need only be determined by a judge by a preponderance of the evidence standard. 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67. Plainly, if the determination of a fact issue that affected the length of a

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[8]Curiously, appellant tries to turn his argument into a substantial federal question by pointing to an apparent split in authority among the circuits in the standard of proof appropriate under federal forfeiture statutes (Jurisdictional Statement, p. 19). However, the instant case, while it may have some analogies to forfeiture, does not involve a forfeiture. It involves the setting of an appropriate fine by the court as a sentence following a criminal conviction.

liberty deprivation could be made by a preponderance standard, it should go without question that a property deprivation need be subject to no greater standard.

After all, a preponderance standard is the standard of proof almost invariably used in connection with civil lawsuits over money. Cf. Addington v. Texas, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).} And, although this matter involves the amount of a fine being imposed in a criminal prosecution, at its essence, it is nothing more than a question of property deprivation, not a question of liberty deprivation.

This is not to say that the Due Process Clause does not protect property interests. However, appellant's Due Process rights were protected, first, by

the requirement that guilt of an offense be demonstrated beyond a reasonable doubt. When guilt is proven the fact of the criminal conviction permitted society to exact upon appellant any fine that would not violate the Eighth Amendment. The amount of that fine was no more than a sentencing determination, and a consequence of appellant's demonstrated criminal culpability.

Yet, even assuming that some kind of hearing beyond the trial (at which appellant was convicted by proof beyond a reasonable doubt) was required to deprive appellant of "property," New York's legislative scheme plainly provided for that hearing. New York CPL section 400.30 authorizes the court to hold a hearing where the court concludes that a sentence of a fine should be imposed and that fine should "be based upon the

defendant's gain from the commission of the crime." It provides for notice to the defendant and for an opportunity to be heard as to the amount of the gain. Indeed, if the court does not accept the defendant's statement, or the defendant does not wish to make a statement, section 400.30 places on the People the burden to prove the amount of the defendant's gain.

This legislative scheme plainly provided appellant with an opportunity to be heard at a meaningful time and place. See Parratt v. Taylor, 451 U.S. 527, 540, 101 S.Ct. 1908, 1915, 68 L.Ed.2d 420, 432 (1981). It provided him with what was, at least, "appropriate" process considering the nature of the circumstances. See Logan v. Zimmermann Brush Co., 455 U.S. 422, 428, 102 S.Ct. 1148, 1153, 71 L.Ed.2d 265, 273 (1982).

In short, appellant's claim is not one appropriate for the Court's review. In any event, appellant received the process that was due him when the court set an appropriate fine as part of his sentence.

2. The Fine Set Was Less than Double the Gain Authorized by Statute. Such a Fine is Not Excessive: Nor Does Appellant's Argument Do More than Ask the Court to Reconsider The Sentencing Court's Fact Determinations.

Appellant argues that the $25,000,000 fine was excessive and disproportionate. His argument rests, in large part, on his disagreement with the sentencing court's conclusion that appellant reaped financial benefits from his crime.

Appellant's claim is not an appropriate one for this Court to consider under its appellate

jurisdiction. New York's legislative scheme permits a fine of up to twice the gain. Here, the sentencing court did not impose a fine of twice the gain. Rather, it imposed a fine that was only slightly more than what it found the gain to be. Thus, neither that court nor the state appellate court needed to reach the issue of the constitutionality of the legislative scheme. The issue then becomes nothing more than whether a particular sentence violated the Constitution, and appellant has not shown why that claim raises any issue of special importance for the Court to consider. Certainly, the mere fact of a high fine, in isolation, presents no constitutional claim worthy of this Court's review.

In any event, this Court has long recognized that fines set at twice the profit of one's wrongful conduct do not violate the federal Constitution. See Shevlin-Carpenter Company v. Minnesota, 218 U.S. 57, 30 S.Ct. 663, 54 L.Ed. 930 (1910); Coffey v. Harlan, 204 U.S. 659, 27 S.Ct. 305, 51 L.Ed. 666 (1907). Indeed, the Model Penal Code, from which New York's statute derives, promotes a provision authorizing a fine of twice the "pecuniary gain." Mod. Pen. Code § 6.03 (5), Model Penal Code and Commentaries, p. 58 (American Law Institute 1985). And, as recognized by appellant, a number of states have enacted such legislation (Jurisdictional Statement, p. 12 n. 6). Thus, New York's provision is hardly unique or unusual.

It is certainly true that the fine imposed in this case was large. However, so was the fraud. The check-kiting scheme involved the transfer of $9,200,000,000. By this kite, appellant took $23,000,000 of other people's money. He used the money to increase his own wealth by $100,000,000. He was able to return the $23,000,000 he had taken solely because of the profitable investments he had made with the funds obtained by fraud. As the sentencing court found, primarily on appellant's own trial testimony and evidence, the specific property into which the swindled funds were placed appreciated by at least $21,770,000. Moreover, as the evidence showed, appellant had avoided a significant cost -- $2,320,000 in interest -- by taking the money by crime rather than by a loan.

Of course, the trial court's determinations of gain were not and could not be scientifically precise. Appellant commingled the funds taken by fraud with the funds of his various businesses. The taking and commingling had two results. Rather than losing his assets, appellant preserved them. Further, their value increased by $100,000,000. Arguably, appellant's criminal profit was the $100,000,000 appreciation in his businesses as a whole, businesses that, but for the crime, he would have lost. Indeed, his gain was arguably the retention of a $200,000,000 financial empire that, but for the crime, would have been lost. The court, however, limited its theory and findings of gain to the appreciation on the specific properties into which kite funds were "pumped." She utilized this methodology

even though, as she conceded, it calculated only "some - far from all" of appellant's profit from his crime (App. 7a).

That the court's calculations are not scientifically precise does not mean, as appellant contends, that the fine was excessive and disproportionate. The trial court's methodology and calculations have a reasonable relationship to the criminal conduct. The Constitution requires no more. In reviewing determinations of civil damages, this Court has recognized that the "wrongdoer is not entitled to complain that [the measure of damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." Story Parchment Co. v. Paterson Parchment Paper Co., 282

U.S. 555, 563, 51 S.Ct. 248, 250-251, 75 L.Ed. 544, 548-549 (1931). What happened in this case is that, having commingled the funds, the swindler now berates the trial court for being unable to trace the criminal funds to his satisfaction. What appellant ignores are the salient facts: but for the crime, appellant's assets would have been lost; because of the crime, he retained assets whose value increased by $100,000,000.

Appellant's argument to this Court boils down to asking it to reject the factual findings of the sentencing court, and recalculate the gain itself. However, this Court has long recognized the findings of fact made in the state court in interpreting a state statute should be treated as conclusive. Waters-Pierce Oil Company v. Texas, 212 U.S. at 97, 29 S.Ct. at 221, 53 L.Ed. at 424-425,

supra. Indeed, even if the state judge had been determining facts in connection with a constitutional principle, they should be accepted, at least absent exceptional circumstances. California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 111-112, 100 S.Ct. 937, 946, 63 L.Ed.2d 233, 247 (1980). His effort to argue the evidence in a manner rejected by both the sentencing and state appellate courts should carry no weight with this Court.[9]

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[9]Appellant, notably, provides no figure of his own for his total "gain". Indeed, despite the undisputed evidence of a $100,000,000 increase in the value of his businesses, an increase which could not have occurred but for the crime, appellant persists in his claim that there was no evidence of appreciation, and that this lack of evidence was "undisputed" (Jurisdictional Statement, p. 24).

Further, appellant asserts that the sentencing court engaged in "double counting" and included in its gain

(continued...)

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[9](...continued)
calculations amounts "never in fact realized" (Jurisdictional Statement, p. 20). For example, he asserts that in evaluating the appreciation of the Taft Hotel the sentencing court ignored $12,000,000 in alleged operating losses (id., p. 24).

Appellant bought the Taft Hotel in February, 1983 for $20,000,000. He knew from appraisal reports that, if he could retain and renovate the Taft, he could sell it at a multimillion dollar profit. However, he had no legitimate source of income to renovate the Taft or pay the Taft's $500,000 a month operating losses. Were he an honest business person, he could not have purchased or retained possession of the Taft.

Appellant, of course, was not honest. With $6,000,000 of the kite money, appellant paid the Taft's operating costs for a year and renovated it. In September 1984, he sold a renovated Taft for over $37,000,000. The hearing court reasonably and conservatively calculated appellant's criminal gain from the Taft not at the $17,000,000 gross profit, but merely at the some $14,100,000 that he reported on his taxes as the capital gain (see App. 15a).

Appellant's complains that, in reaching this figure, the court ignored
(continued...)

Indeed, if the sentencing judge was

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[9](...continued)
$12,000,000 in operating losses. These so-called losses consisted of depreciation (on a building appellant could not have owned but for the crime) and business expenses (the operating and renovation costs paid with the kite funds). Based on those so-called losses, appellant took a $12,000,000 deduction on his personal income tax, thus sheltering $12,000,000 of his real income. In truth, the alleged Taft "losses" were an enormous financial benefit which should have been added to the $14,000,000 capital gain on the Taft, a property he could not have owned but for his crime (Acox: T521, 525-529; People's Hearing Exhibit 7, at A.D.R.App. 261-271; Defense Hearing Exhibit A, at A.D. App. 688).

Appellant's reference to the "saved interest" as "double counting" and being something "not realized" is similarly misleading. In appellant's view, he and the criminal justice system are even because he returned some $23,000,000 of wrongfully withheld money plus interest to the banks. But the interest that he repaid commenced when the scheme was discovered. It did not account for the interest saved by appellant during the course of the scheme. Plainly, saving interest that an honest man would have had to pay was a concrete gain to appellant. See Dickman v. Commissioner, 465 U.S. 330, 337, 104 S.Ct. 1086, 1090-1091, 79 L.Ed.2d 343, 350 (1984).

little more than half correct in her factual findings, the sentence imposed did not exceed the amount of twice the gain permitted by New York law. And, as noted above, this Court has upheld provisions that permit such fines. Thus, the fine imposed was plainly neither excessive nor otherwise unconstitutional.

3. Under New York's Legislative Scheme, Fair Notice is Given that the State Considers the Criminal Defendant's Financial Advantage Obtained from the Commission of the Crime to be the Gain Susceptible to a Fine.

Appellant also claims, in essence, that he did not have fair notice that, if convicted of his fraud, a fine related to "all profits or appreciation on appellant's property in which the kited funds were used" might be imposed (Jurisdictional Statement, p. 24). Appellant would have this Court believe

that, as far as he could foresee, New York State was going to let him invest money obtained by crime and, if the investments proved profitable, keep the profit. Appellant reaches this conclusion because he finds no reported cases in New York on the subject and because other statutes in New York expressly refer to appreciation in other contexts.

True, the Due Process Clause requires that the consequences of violating a given criminal statute be stated with sufficient clarity to provide fair notice of those consequences. United States v. Batchelder, 442 U.S. 114, 123, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755, 764 (1979). However, this does not mean that a state statute must be given the niggardly meaning appellant would ascribe to it. See United States v.

Brown, 333 U.S. 18, 26, 68 S.Ct. 376, 380, 92 L.Ed. 442 (1948).

New York has long indicated that its policy with respect to fines is that the courts be able to take "the profit out of crime." People v. Gittelson, 25 A.D.2d 265, 270, 268 N.Y.S.2d 779, 785 (1st Dept.), affirmed, 18 N.Y.2d 427, 276 N.Y.S.2d 596, 223 N.E.2d 14 (1966). Although, in appellant's mind, taking the profit out of crime is an "unprecedented and most improbable" concept (Jurisdictional Statement, at 4), the principle of denying the criminal his profit is not new:

> No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have

> nowhere been superseded by statutes.

Riggs v. Palmer, 115 N.Y. 506, 511-512, 22 N.E. 188, ___ (1889); see also Carr v. Hoy, 2 N.Y.2d 185, 187, 158 N.Y.S.2d 572, 139 N.E.2d 531 (1957).

The logic of Gittelson is reflected in the statute at issue, by which a court may impose a fine "not exceeding double the amount of the defendant's gain from the commission of the offense." New York Penal Law Section 80.05(5); see People v. Sohayegh (Supreme Court, New York County, 1986) (New York Law Journal, June 11, 1986, at 12). The fine provision "forces the offender to disgorge any ill-gotten gains and to forfeit an amount which is in excess of those gains but nevertheless related to them." Commission Staff Notes to Penal Law section 80.00, New York Consolidated Laws

Service, v. 23, p. 384 (Lawyers Co-operative 1984).

In fact, New York Penal Law section 80.00 (2) quite clearly includes in the definition of gain "the amount of money or the value of property derived from the commission of the crime." Without question, the fine was based upon what appellant derived for himself through the commission of his crime. And New York has long recognized that gain "is sufficiently generic to refer to whatever is obtained from the use" of property. Thorn v. DeBreteuil, 86 App.Div. 405, 416-417, 83 N.Y.S.2d 849, 857 (2nd Dept. 1903), modified on other grounds, 179 N.Y. 64, 71 N.E. 470 (1904).

Indeed, by dictionary definition alone, "gain" includes "increment in value" and "appreciation in value or worth of securities or property."

Black's Law Dictionary, p. 610 (5th Ed., 1979); Palmer, The Law of Restitution, Sections 1.8 and 2.12 at 44-45, 159 (Little, Brown & Company 1978). Webster's defines "gain" as "an increase in or addition to what is of profit, advantage, or benefit." Webster's Third New International Dictionary, p. 928 (G&C Merriam Co. 1969). And Ballantine's Law Dictionary simply adopted the definition in New York's Thorn v. DeBreteuil case for its own. Ballantine's Law Dictionary, p. 512 (Lawyers Co-operative 1969).

The logic of such definitions is clear. Suppose that a swindler takes $1,000 and bets it at the racetrack where, as luck would have it, he wins $10,000. Upon being caught, the swindler could happily restore the $1,000 taken

and say, "I've returned the gain; therefore, I can't be fined."

But he has not returned the gain. The gain is not just the $1,000 he took by crime. It is also the $10,000 he won, the profit he could not have realized but by his illegal taking of the $1,000. Both are the gain. To permit him to keep any portion of these "ill-gotten gains" would make crime profitable, contrary to the dictates of the New York statute.

Under the logic of the New York legislative scheme, appellant's gain was not simply the $23,000,000 wrongly taken, which he returned when the fraud was discovered. The gain was what appellant "gained" from the use of the wrongly obtained funds. The wrongly obtained money was invested in appellant's property and became, as the sentencing court found, "the life-blood of

[appellant's] businesses .... [by which appellant] saved his financial empire" (App. 7a). It was the "life-blood" by which appellant retained possession of his $100,000,000 of assets. It was the "life-blood" which enabled those assets to appreciate another $100,000,000 in value.

To recognize this admitted appreciation as an economic "gain" is plain business reality. The financial benefits of fraud were certainly plain to the appellant. Why else did he spend a year of his life committing the greatest check fraud in American history? The benefits of continued retention and appreciation are, where obtained by fraud, squarely within the language and purpose of the statute. Nor was this sentencing court the only New York court, as appellant suggests, to determine that

"appreciation" is criminal "gain" under the sentencing statute. People v. Sohayegh (New York County Supreme Court, 1986) (New York Law Journal, June 11, 1986, at 12).

Gain, moreover, is not only appreciation. Gain is the amount by which a wrongdoer saves himself "expense or loss." Restatement on Restitution, Section 1, Comment b; Palmer, Section 2.10 at 136, supra. The application of this principle to this case is obvious. By his check-kite, appellant took $23,000,000 which, upon being caught, he agreed to restore with interest commencing in April 1984, when the crime ended. Yet the appellant never paid interest for the use of the $23,000,000 from March 1983 to March 1984, the period of his crime.

This unpaid interest is a gain from the crime. The use of money has value. As this Court has noted, the "measure of that value is interest - 'rent' for the use of the funds." The cost of "renting" the money is "readily measurable by reference to current interest rates." Dickman v. Commissioner, 465 U.S. 330, 337, 104 S.Ct. 1086, 1090-1091, 79 L.Ed.2d 343, 350 (1984).

* * *

Most telling of the effectiveness and appropriateness of the sentence imposed is appellant's implicit recognition that he would have thought twice about his conduct if he had realized that his decision to obtain a profit by fraud would have resulted in his being forced to disgorge the profit thus made (Jurisdictional Statement, p.

28 n. 11). Most telling of the dishonesty of appellant's claims regarding the factual conclusions of the sentencing court is appellant's suggestion that he would have been more "circumspect" in his sworn trial testimony if he had only known that his sworn testimony would have been relied upon at sentencing (Id., p. 28).

Appellant was convicted of a fraud involving billions of dollars. It was a rational crime, committed for the purpose of making, and keeping, a huge criminal profit. Even the most common criminal, whether a purse thief or a chain snatcher, understands that society does not permit the criminal to profit by his crime. Despite his anger at the sentence which stripped him of the criminal profit he worked so hard to obtain, appellant was on plain notice

that, if convicted, he would not be allowed to keep the "gain" from his fraud. He was afforded a sentencing hearing and a full opportunity to be heard on the amount of that gain. The gain was found to be more than $20,000,000. Although the court was authorized to fine appellant well over $40,000,000, he was fined only $25,000,000. That fine was not disproportionate to his $9,200,000,000 scheme to defraud.

True, the fine tends to reduce appellant. It reduces his assets to those which would have been retained by the honest person who, when faced with bankruptcy (as was appellant), tries to preserve his wealth by methods other than crime. According to appellant, however, the Constitution demands that he be put in a financial position superior

to that of the honest business person. The Constitution requires, in appellant's mind, that he be permitted to retain the financial rewards of his crime.

Appellant's complaints present no issues for this Court to consider.

CONCLUSION

Wherefore, appellee respectfully submits that the questions upon which this case depends are so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the case by the Supreme Court of the State of New York, Appellate Division, First Department.

Respectfully submitted,

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